No. 13681

In the United States Court of Appeals for the Ninth Circuit

ERNESTINE C. SINISCAL AND ELMER A. REED, APPELLANTS

v.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON; HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE; WILLIAM F. BRENNER AND FRED M. MARSH, APPELLEES

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UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The district court did not write an opinion. The findings of fact and conclusions of law appear at R. 55-63.[1]

[1] At R. 20-27 are certain facts agreed to by all parties with the exception of appellants Reed and Siniscal, plus other facts agreed to by the Government and Alexander, intervenor below. When the court made its ultimate findings and conclusions after trial, it expressly found as true all such facts contained in the Pretrial Order except that it made a minor amendment in one of them (R. 55-56).

JURISDICTION

The jurisdiction of the district court and of this court is set forth at page 2 of the Government's opening brief as cross-appellant.

QUESTIONS PRESENTED

1. Whether, where federal law provides that property held under trust patents may be sold to another Indian at a value to be administratively determined, but requires public bidding if sold to a non-Indian, and a non-Indian uses an Indian to take title as a purported purchaser, having in advance taken a deed from the supposed purchaser, the non-Indian paying for the land and placing $25,000.00 in escrow for the supposed Indian purchaser for her services, the trial court erred in concluding under all the circumstances of the case that the transaction is fraudulent and in adjudging that the instruments purporting to place title in the non-Indian are void.

2. Whether the court erred in concluding that the Area Director, in signing an Order Transferring Inherited Interests and an Order Removing Restrictions, essential elements in this transaction, exceeded his authority, and in adjudging the entire transaction void.

STATEMENT

The nature of this case, an analysis of the pleadings, the court's findings, conclusions, and judgment, are fully set out at pp. 3-10 in the Government's brief as cross-appellant hereinbefore filed, and need not be here repeated. In that brief, however, since the questions raised by the Government on its appeal turn upon the findings as made by the court below, no analysis of the evidence was necessary. At pages 2-6 of the brief of

appellants Siniscal and Reed is a purported statement of the case which is entirely devoid of record references. In this situation, the Government proceeds to give this Court a chronological, documented resume of the testimonial record in this case. This case logically divides into two phases.

1. *The Alexander-Reed Project—May to July 13, 1951:*—Appellants correctly state (Br. 3) that the transaction the subject of this suit was initiated in May, 1951, when Alexander contacted Reed, an Indian, about the possibility of purchasing the land in suit, and that they visited the Indian Bureau at Portland in that connection and dealt with La France and Flinn.[2] Reed had had previous dealings with Alexander (R. 937). Asked what was the deal between him and Alexander, Reed testified that "I was to purchase it and turn it over to him at a profit to myself of $12,500.00," but he did not tell La France about the deal (R. 937-938).[3]

Then occurred one of the bizzarre features of this case. La France testified that Mr. Patrick Gray, a former forester in the Portland Office, was acquainted with the facts and made an appraisal of the timber on the land (R. 140). La France was one of those who

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[2] Flinn was the Realty Officer at the Indian Agency (Fdg. I, R. 56) and La France was a Land Field Agent under Flinn, from whom he received his orders and instructions (R. 134-135).

[3] Reed is no simple-minded Indian, as he had been an official of the Siletz Tribal Council "off and on for about 10 years" (R. 930). Reed had also been an intimate of Dr. Roe Cloud, deceased at the time of trial (Appellant Siniscal's Deposition, R. 783), where she explained that it wasn't necessary for anybody to explain to her the procedure for purchasing Grant's land because "He [Dr. Roe Cloud] had discussed it several times at my home in Cutler City * * *. There were many such discussions" between Reed and Cloud going back as far as 6 or 8 years (R. 783-784). And Dr. Roe Cloud was the Area Realty Officer at the Swann Island Indian Office in Portland, the position to which Flinn succeeded upon Cloud's death, in February, 1950 (R. 133-134).

talked to Gray about making the appraisal. He asked him what "he thought the appraisement would be" and that "that is what he fixed up" (R. 141). Gray's appraisal was quickly forthcoming (Ex. 13 (R. 144-146) dated May 16, 1951), and is quite revealing. It recites "that on the [ ] day of [ ], 19 , I personally visited and made a careful inspection of the following described lands (describing the lands of Grant and Thornton)," and estimated the timber at 24,000,000 feet at $5.50 per thousand, or $133,000.00. The land, as distinct from the timber, was valued by La France at $2400 (R. 145, 746), which brought the total to $135,000.00. The appraisal recited that it was based upon a cruise by another, Marion Wilkes, in 1925, which was twenty-six years previous (R. 146).

Gray testified at the trial (R. 516-532). His testimony may be thus summarized: He was not the appraiser for the Lands Division of the Indian Office, but was employed by the Forestry Division of the Indian Office. The appraisal was based on what knowledge he had of log values, sales, etc. (R. 518), but he had no knowledge of any comparable sales in the vicinity at that time (R. 519), he did not know there were any lumber mills in Gold Beach, where the property is located (R. 527-528), and his appraisal was on the theory that the timber would have to be hauled to Coquille, Oregon, at a cost of $16.00 per thousand feet (R. 520). His file contained no information of comparative sales in 1951. Moreover, Gray had not been on the property since 1946, or perhaps 1944, when he "went through there." He had not been on it more than once, but had passed "pretty close to it" (R. 517).[4] Regarding his regular

[4] That the appraisal was otherwise illegal is shown by 25 C.F.R. section 241.24 which governs "Appraisement of lands for sale". This

duties, Gray testified he had to do with fire protection, he "assisted in appraising timber lands and timber", "inspected" timber sales, compiled statistical records, checked scales, and did "any job that came along", that he seldom was called upon to look at or sign appraisal certificates and that the one in this case was the only one he had signed in the twelve months preceding May, 1951 (R. 528). He testified also that his appraisal took perhaps a half an hour or an hour, that he "made some pencil notes and figured it out from there", and that when he had been on the property in 1946 he did not cruise it—"I walked through some of it" (R. 530).

La France testified it was the first appraisal made in that manner and that it was "unusual" (R. 246). La France also testified that the regular appraiser was Mr. Hague, but he was then busy elsewhere (R. 759). The trial court elicited from La France that there was no urgency about making the appraisal, and that he took no steps to have others check the appraisal (R. 759-760).

On June 22, 1951, Reed and Alexander, obviously having been advised of the appraisal at $135,000.00, reduced their agreement to writing. This agreement, not printed in the record, was attached as an exhibit to Alexander's complaint in intervention and is Pretrial Exhibit No. 34 (Fdg. X, R. 59). It provided that

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requires that "the superintendent or other officer in charge shall *visit, view*, and appraise it at its full value." (Italics supplied.) It contains the further provision that no land could be sold unless an appraisement had been made within 6 months of the sale. The obvious intent here is to bar appraisements based on viewing the property more than six months before sale. The possibility that an appraiser can accurately gauge present timber footage on another's cruise, even though it is twenty-six years old, is at best dubious. But, conceding that, it is irrelevant since the regulation provides otherwise and Gray's appraisement violated it, since he never left his office when he made the appraisement.

Alexander was to have until August 21 to cruise the timber on the lands here in question, and he would elect whether to purchase the property for $147,500.00. That if he so advised Reed before August 21, 1951, Reed would take steps to obtain the title, that Alexander would pay to the Indian office $135,000.00 and give Reed $12,500.00 upon delivery by Reed of a good and sufficient warranty deed.

On July 13, 1951, Alexander and Reed, accompanied by Grant and Thornton, visited the Indian office again.[5] At that time Flinn had ruled the transaction out and Reed and Alexander were informed that the contemplated sale to Reed would not be made. The reason given by La France was that it was known to them by that time that the real purchaser was Alexander (R. 151) and that "we couldn't have sold to Alexander without a competitive bid" (R. 758). Reed testified that La France and Flinn told him "They didn't want to risk having any trouble in the case" (R. 939).

Notwithstanding the fact that the proposed sale was off, consents to sell the property for $135,000.00 were procured by La France from Grant and Thornton at that time. (Exhibits 11 and 12, R. 155-157.) This circumstance prompted the court below to ask La France why it was done, and La France answered (R. 154) that "They were taken only for our records, *and*

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[5] La France testified he had informed Reed on his first visit in May that consent of the two Indians was necessary (R. 146). Reed undertook to reach the Indians and ran into some difficulty. He found Grant on June 18 or 19, at Gold Beach, when he was in no condition to talk. Reed took him up the river 18 miles, kept him there all day until he sobered up, then explained the purchase to him, and he agreed to go to the Indian Agency (Deposition of Reed, R. 933-934). He did not reach Thornton until July 11, when he found him in jail in Crescent City, California, in a bad mood (R. 935-936).

in the event in the future a purchaser could be found in the future" (italics supplied).

While Alexander's dream was blasted, his scheme lived on, because practically coincident with Flinn's refusal to deal with Alexander, and even before that, a new cast of characters came upon the stage, and succeeded where Alexander had failed. The case from this point on is remarkable in this respect, that whereas the good faith of Alexander and Reed had been suspected and finally denounced by La France and Flinn, no obstacle was interposed in the path of those who took over, even though Reed was shown to be connected with it.

2. *The Blanford-Marsh-Brenner-Taylor Project—July to August 7, 1951:*—The second phase of this case opened with the entry upon the scene of John C. Blanford, a defendant in the court below. Appellant Reed testified that Blanford came to him at his home in Cutler City "sometime in July" and said he "wanted to make a deal" on the Grant and Thornton allotments and that Reed declined. Blanford came to him twice, Reed fixing the dates as July 1 and July 13 or 15 (R. 948-949).[6] Reed further testified that when, on the

[6] The Government was unable to prove directly how Blanford became aware of the possibilities respecting the allotments. Of the four persons who had been dealing previously, it can certainly be said that Alexander did not inform him. Reed claimed not to have met Blanford previously (R. 948). However, La France had met Blanford three or four times and defendant Marsh about three times previous to this transaction, but he denied that either Marsh, Blanford or Brenner, defendants below, had ever made any inquiry of him regarding the property (R. 749). Blanford was no stranger to Flinn, however. Flinn brought Blanford to the office of E. Morgan Pryse, the Area Director at the Indian Office, several years prior to this transaction and recommended him for employment by the Indian Office (R. 353). No information could be elicited from either Blanford or Flinn, since they, as well as Marsh, declined to testify on pleas of self-incrimination when called as Government witnesses (R. 497-515).

latter occasion, Blanford made this proposal Reed asked him "if Marsh and he were working together" and Blanford told him they were. This showed that Reed already knew that Marsh was then engaged in an endeavor to procure the property and that Reed expected to be contacted in that connection (R. 948-949).[7] Reed declined Blanford's invitation, telling him "nothing doing because I had a contract with Alexander for the property" (R. 951). This was on July 13 or 15, their second meeting, when Reed knew the Alexander deal was dead. He suggested his daughter, appellant Siniscal, might "make the deal for him", gave her address to Blanford (R. 951) and on July 17, 1951, talked with his daughter about going in on this deal for $25,000.00. He told her his deal with Alexander fell through and that if she "can go and buy it and make any money with it, go ahead and I will give you all the advice I can" (R. 952-953).

Siniscal testified that, after her father discussed the matter with her, Blanford called her on the telephone, telling her he wanted to discuss the matter he had talked to Reed about, and she agreed to see him at her home. He told her "it was all fixed at the Swann Island Area office so he could get the Grant allotment for his buyer. He said that because of my Indian blood I would be able to have the title transfered to me and when I passed title to his buyer I would have a profit of $25,000.00" (R. 787).[8]

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[7] Reed's attempt to remedy this by testifying the name Marsh just came to him "out of a clear blue sky" (Reed's pretrial deposition, R. 950) is fantastic. When at the trial Reed testified he had not previously known Marsh, the court below warned him "to tell the truth" (R. 465).

[8] This quotation is from a statement Siniscal had given prior to her deposition to a Government agent named Hoppenjans. It was being read by her during her deposition because she claimed it was

Appellant Siniscal in her deposition referred to "my commission" of $25,000.00 and stated that she well knew what she had to do "to earn it". She was "to have the title transferred to me from the Indians, Grant and Thornton, and I was to sell it to this person Mr. Blanford contacted". She got this information from Blanford through a conversation in "the last two weeks of July". She further deposed that "It wasn't necessary for anybody to explain it [the procedure] to me because I have been acquainted with Dr. Roe Cloud, now deceased, and it was quite clear to me", citing numerous discussions she had heard between Cloud and her father (R. 782-783).

Having arranged for the services of Mrs. Siniscal, as an Indian, to "get the Grant allotment for his buyer", it developed that Blanford and Marsh also needed someone to put up the money. To this end Blanford called upon William A. Brenner, a building contractor, at his home in The Dalles, Oregon.[9] Brenner fixed the time as in July and "about a week before I went up there and talked to Mr. Taylor". [It is unquestioned in the record or by appellants that the first Taylor contact was on August 3, 1951, Fdg. 5, R. 25.] Blanford told him there were 800 acres and gave him

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wrong in some respects. She did not, however, deny the above-quoted statements. The statement (in her deposition (R. 788)) that she thinks she has "already disputed that statement" refers to a statement that she did not understand what she was to do to earn the $25,000.00, which she had repudiated at R. 782-783.

[9] Brenner was married to a niece of Flinn. He built a house for Flinn for $10,000.00 and extras Flinn ordered raised this to $13,000.00. Flinn was to get a bank loan to pay Brenner. Although the house was 80% complete when this litigation started, Brenner did not receive anything from Flinn until about the time a reporter for the *Oregonian*, a Portland newspaper, contacted him about the Grant-Thornton sale, when Flinn procured the loan (Brenner testimony, R. 83-88).

the timber footage, stating that at the price of $160,000.00 it was a good deal and "some money could be made off of it".[10] Blanford asked Brenner for help in financing it. A week later Flinn came to Brenner, according to Brenner in connection with the house Flinn was having built, and Brenner asked Flinn "if that timber could be bought that way, as Blanford had explained it to me". Asked how Blanford had explained it to him he replied that "it had to be sold to an eligible Indian purchaser, and then it could be transferred or sold to a white man, *but it couldn't be sold directly to a white man.* I do remember that conversation about it". (Italics supplied.) Blanford gave Brenner the impression that "only an eligible Indian could buy that property without advertisement and sale by bid. * * * It had to be sold to a good faith Indian purchaser from a qualified Indian seller". Blanford also told him he was in with Marsh, whom Brenner had known for a year, on this transaction, and that the three of them would be "trying to make the deal". Brenner testified that at that time no definite arrangement was made, and that later, around the 6th or 7th of August, an agreement was made that Blanford would get 25% of any profit accruing to the three of them and Marsh and Brenner would get the balance (R. 88-92).

On August 3, 1951, Flinn went along with Brenner to call on defendant, non-appealing, Henry B. Taylor, whose home was 80 miles from The Dalles. Mrs. Taylor was present during the conference. Brenner did the talking, describing the property and the prospect of making money. He "told him all I knew about it, I mean, I didn't know very much of the actual procedure

[10] The figure of $160,000.00 derived, of course, from the $135,000.00 figure for the land and the $25,000.00 to be paid to Siniscal.

outside of the fact that Mr. Blanford told me that it had to be sold to an Indian before it could be sold again to a white man". Brenner and Taylor had an understanding how much Taylor was to pay, what Blanford and Marsh were to take, and later on Taylor decided he wouldn't deal on a partnership basis, but would only give them an option (Brenner testimony, R. 94-96).

Brenner further testified that later that day, August 3, Taylor telephoned Brenner that he was interested and came into The Dalles. Taylor wanted to look the property over. Brenner called Blanford who said Marsh would be there to show them the timber. Taylor and his wife, with Brenner, flew to Gold Beach the next day, arriving at noon.[11] There they met Marsh, a cruiser named Newell and, by a strange coincidence, Flinn [12] (R. 97-99). That afternoon they went to the property which is two or three miles from Gold Beach. They spent four or five hours there. There was some discussion as to there being "around 30 or 40 million feet of timber" and that it might be worth $10 [per thousand]. The Taylors and Brenner flew back to The Dalles the next day. Taylor said he was interested in doing something on it, but Brenner did not know anything definite until they came to Portland on August 7 (Brenner testimony, R. 101-104).

Brenner's testimony, so far as his contacts with the Taylors and the trip to Gold Beach are concerned, was fully corroborated by Taylor in his pretrial deposi-

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[11] Brenner testified he paid for the plane trip to Gold Beach and for the plane in which he and Taylor flew to Portland on August 7 to conclude the transaction, but could not recall whether he picked up Taylor's check at the hotel in Gold Beach for the night of August 3 (R. 121).

[12] Brenner denied any knowledge of how Flinn learned they were going to Gold Beach to look at the property (R. 119).

tion (R. 842-925) and by his testimony at the trial (R. 661-690). He testified that on the inspection of the timber there had been some discussion about there being 30,000,000 feet of timber, but that he was "going on his own judgment" and "I felt plumb well satisfied it was there after looking over the timber". "I felt there was a good profit there", showing he had already been advised of the $160,000.00 price (R. 873). When he examined the timber he made no inquiry as to what similar timber was selling for in Gold Beach because "I knew what I could get for the logs" (R. 918).

Taylor was told that "we couldn't deal direct with an Indian, but it had to come through the Bureau of Indian Affairs". Brenner had told him at his house in The Dalles that it had to be bought through another Indian. He testified that he understood that he could not buy it and that "it had to be sold to a good-faith Indian purchaser" and that when he got to Portland on August 7, 1951, he learned Mrs. Siniscal was the Indian from whom he had to get his deed (R. 877-880).

On August 6, 1951, appellants Reed and Siniscal appeared at the Indian Office and there the mechanics of the project swiftly emerged.[13] There Siniscal made an application for removal of restrictions on the sale or encumbrance of the land in question. (Ex. 9, R. 172-177.) At that time, of course, no instrument had been executed purporting to give her any interest in the property. This application form calls for considerable information regarding the financial status of the applicant. The purpose of the form is to establish competency of the applicant so that restrictions upon

[13] Siniscal explained that Blanford told her to come to Swann Island and she telephoned her father and he accompanied her (R. 813-814).

property can be safely removed, and the Indian entrusted with its future disposition.

Appellant Reed testified that "we [Reed and his daughter Siniscal] made out the application in La France's office at the Agency. Mr. Schmitt, counsel for Mrs. Siniscal, accompanied them to the Agency, but "Schmitt was outside". Although Mr. Schmitt was representing Siniscal, Reed did not want him to see the application. "I was her advisor. I was the proper person to advise her". (Reed testimony, R. 963-964.)

La France testified he prepared the application, using information as supplied by Reed and Siniscal (R. 170, 202-203). The application so prepared, and signed by appellant Siniscal (Ex. 9, R. 172-177), shows Siniscal as having an income during the preceding twelve months of $20,000.00 from business, which is ascribed to a one-half interest in a seafood and grocery market, and also claimed an average annual income for the past three years of $10,000 gross (R. 174). She further claimed she owned personal property consisting of household goods ($1500), automobile ($2500), ½ interest in business equipment ($4000), and real estate valued at $17,000 (R. 175). Siniscal, in her deposition, with regard to these items testified that the income claimed was based on her father's income (R. 798-799). She had never filed an income tax return in connection with that business, and the $10,000.00 yearly average income she had claimed was the income from the same business (R. 800). She evaded a question as to whether she ever received any of such income, stating she had received "considerable assistance from my parents" (R. 800-801). As to real estate, listed by Siniscal as her town property at a value of $17,000.00 (R. 175). Siniscal

admitted: "That is my mother's ranch and the real property consisting of the market which is located in Cutler City" (R. 801).

In a statement given prior to her deposition to Government agent Hoppenjans, Siniscal had stated "I do not own any property in Portland or elsewhere" (R. 786). By the time her deposition was taken, she stated: "I would like to dispute that statement because I have *a daughter's interest* in *my father's property* and also in *my mother's property*" (R. 786, italics supplied). Her claim that she owned a half-interest in her father's property she also rested upon her having "a silent partnership in my father's business as I put $600.00 in my father's market and seafood business * * *". She asserted an interest in her mother's property because it "was given my mother on my grandfather's death and is to be passed from one daughter to another until there was a refusal of one to take it" (R. 795-796).

Reed, since he had participated in the giving of the information contained in the application, naturally sought to make the same explanation. He testified that the business cost him $12,000.00 in 1944 and, lacking $600.00 of the $5,000.00 down payment, Siniscal supplied it. He testified there was no partnership agreement. Siniscal's interest in the business was not fixed. "There was no specific amount" and he figured that "she actually put $600.00 in it and that was her equity in it" (R. 944-945).

The final gem in Siniscal's application for removal of restrictions was her answer of "no" to the question "Have you made an agreement to sell your land", i.e., the land from which she was asking removal of restrictions, to which she replied "no" (R. 176).

The record shows that on October 9, 1951, two months after the transaction in question here, Reed filed an application for removal of restrictions on 86.7 acres of land. Its signing was readily admitted by Reed (R. 942). The application appears as Ex. 27, R. 206-211. Identical information to that contained in the Siniscal application and hereinbefore recited was given by Reed. Reed testified that an automobile ($2500.00), farm machinery ($1500.00) and business equipment ($4000.00) claimed in both Siniscal's and his application were in his and his wife's name (R. 946-947). Reed readily admitted the application was a duplicate of Siniscal's (R. 947). He sought to explain it on the basis of Siniscal's having given him $600.00 when he bought the market, and on the general proposition that all the family had an interest in the property.[14]

La France, Flinn's subordinate, testified that the information in the application of Siniscal was supplied by Reed and Siniscal (R. 170-171), and that he had no reason to disbelieve it, that the subsequent order removing restrictions was based on the application, and that he would not have approved the application had he known it was false (R. 181, 183-184).

Another instrument prepared by La France at the Indian Office was an Order Transferring Inherited Interests in Indian Land (Ex. 5, R. 163-166). Where inherited allotted land is held by the United States in trust for one Indian and such Indian validly sells his interest to another Indian or to an Indian tribe, the

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[14] This unique system of property law was quite flexible and Reed could abandon it when it suited his purpose. Asked if, under his theory, he would have an interest in the $25,000.00 Siniscal was to get from the Taylors, Reed denied it. Asked if the $25,000.00 was "the only thing that you don't own together" he replied "That is right" (R. 957-958).

practice is to have this reflected on the Government's record by an order which transfers the interest of the selling Indian to the buying Indian, the fee remaining in the United States in trust for the purchasing Indian. Two standard forms for transferring inherited interests are in use and were put into the record of this case. Exhibit 21, R. 160-162, is a form for use in transferring the inherited interest of one Indian to another Indian. It specifically and expressly states that it relates to lands which were allotted under the General Allotment Act, and thus was perfectly suited to effectuate any valid transfer of the interests of Grant and Thornton. The closing paragraph provides "that the conveyance so made shall not in any manner operate to remove any of the restrictions resting against said land or terminate or otherwise remove any trust or other conditions imposed there against" (R. 162). The other standard form (Ex. 22, R. 166-169) differs in this respect. It is not addressed to General Allotment Act land and it requires title to the land to be taken in the name of the United States in trust for blank, pursuant to the Act of June 18, 1934, 49 Stat. 984. Section 5 of that Act provides "that the Secretary of the Interior may acquire by purchase, gift * * * any interest in lands * * * for the purpose of providing land for Indians" and also that title must be taken in the name of the United States in trust for the particular tribe of Indians for whom it is acquired.[15] Exhibit 22 is obviously inappropriate to the transaction here involved, but it may be noted that under either form, the fee title remains in the Government after the transfer is made.

[15] No such provision is included in the General Allotment Act type (Ex. 21) for the simple reason that the title is already in the United States under that Act.

A comparison of the order in this case (Ex. 5, R. 163-166) with standard form Exhibit 21 (R. 160-163) shows that, with the exception of the last paragraph, the two are identical. But instead of the last paragraph providing, as in the standard form, for no change in the trust status of the property, with the fee in the United States, substitute language was inserted to provide that the inherited interests of Grant and Thornton in the property "is hereby transferred to Ernestine C. Siniscal * * *, subject to the express condition that these lands shall not be alienated, sold, or encumbered without the consent of the Secretary of the Interior."

Questioned about this extraordinary action La France attempted to say that Exhibit 21, the standard form, "was used only when we were dealing with a tribal sale". This was palpably untrue, because Exhibit 21 has no such function and, as stated, it is clear that La France actually used Exhibit 21, but made the change above-noted. La France admitted dictating the changed provision. He also acknowledged that no such form as Exhibit 5, the altered form, had ever before been used (R. 158-159, see also Fdg. III, R. 57). Asked why he changed it, he lamely stated that "I was given to understand that Exhibits 21 and 22 were not a standard form". Then he gave the real reason for the change, stating that Exhibits 21 and 22 "didn't quite fit the order removing restrictions; so they were made to comform to that basis". Asked who gave him such understanding, he answered "Mr. Flinn" (R. 169-170). That La France had been less than candid in this early testimony, and that in making the change he was following the orders of Flinn, the Government's since deposed Realty Officer at the Agency, is made clear by the follow-

ing question and La France's answer while under examination by the trial judge when he was recalled to testify later in the trial (R. 761).

> Q. In other words, you thought that Exhibit No. 21 would have been satisfactory, but Flinn's suggestion was that you make changes in the last paragraph, is that right?
>
> A. Yes, sir.

And of course, Flinn told him just what changes he wanted.

The Area Director, E. Morgan Pryse, had not been at the Indian Office at Swann Island from June 27, when he was called to Washington, to August 6, and upon his return found a backlog of work (R. 281). Part of the backlog was the transaction here involved, which was placed before him on August 7, 1951. Asked if any party had ever talked with him about this sale or purported sale, he replied that the matter was brought to his attention by La France on August 7. He had not had anything to do with the case (R. 282-283). He further testified that nothing in the file indicated a sale to anyone but Siniscal (R. 285).

In approving these orders, he passed on the transaction on the basis of the papers alone and what La France told him about it. But he did not know that the order transferring inherited interests had been changed for this transaction (R. 291). "The record showed that it had been appraised by competent men—at least I thought so" (Pryse testimony, R. 373).

Meanwhile, On August 7, the final steps were being taken by the Taylors and Brenner who flew into Portland and met Blandford and Marsh. This meeting had already been arranged. Taylor on arrival in Portland

advised Brenner that the partnership arrangement was off, that he would give Brenner and Marsh an option to purchase the land for $300,000.00, but refused an option at $260,000. The option (Ex. 6, R. 109-111) was signed after the "deal" was completed. (Brenner testimony, R. 104-105.) Taylor confirmed this (R. 670, 892).

Taylor testified he met Siniscal and Reed that morning in the office of Taylor's counsel, Mr. Henderson, before they went out to the Indian Office. "There was no conversation at all any more than that they were having these deeds drawn up". The deed was for "the Indian Land at Gold Beach from Mrs. Siniscal to Mr. or Mrs. Ben Taylor" (R. 881-882). The deed (Ex. 10, R. 438) was signed by Siniscal at that time, and "we went up to the Bureau of Indian Affairs".[16] (R. 883.)

They went to the Indian Office about 2 p.m., where they met La France. In the office were Taylor, Siniscal, and the latter's lawyer, Mr. Schmitt. "There wasn't very much said. I turned over this here check for $135,000.00" (Taylor testimony, R. 885). He had procured the check the day before, August 6, (R. 886). The check, Exhibit 1, R. 194, bears a notation reading "This check is in payment of an obligation to the United States and must be paid at par", and under that the name "BEN TAYLOR" and "Purchased by". After agreeing that he bought the cashier's check, Government counsel asked: "And you noted that you were purchaser of the land; you were buying that as purchaser of the land? A. That is right." (R. 887.)

Upon return to Henderson's office, revenue stamps

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[16] A second deed was given on August 10, 1951, it having been learned that Siniscal's divorce did not become effective until August 8. That deed was, of course, cancelled by the court below (R. 67).

were affixed to Siniscal's deed to the Taylors (R. 884). At the same time an agreement placing $25,000.00 in escrow for Siniscal pending a determination that the Taylors had good title was drawn up (Ex. 2A, R. 433-436). Also the option to Brenner and Marsh was executed, thus completing the transaction.

3. *Evidence of Value of the Property:*—It remains to be noted that the Government introduced testimony as to the market value of the property on August 7, 1951, in support of its allegation that it was worth in excess of $300,000.00 and that the consideration of $135,000.00 was grossly inadequate. Appellants (Br. 19) say only that "There was a conflict between the witnesses as to the market value of the timber and the market price." Implicit here is an admission that there is substantial credible evidence in the record supporting the court's finding of gross inadequacy. We might leave the matter there, but we proceed to show briefly that the finding is amply supported.

David H. Miller, general manager of Moore-Hill Lumber Company, testified that his company made a cruise of the timber in 1951, and on the basis of that cruise (Ex. 36, original) the timber had a market value of $416,000.00 (R. 241).[17]

Herbert W. Crook, a timber speculator, testified the

[17] This witness had previously testified his company offered $416,000.00 for it, and on objection it was stricken (R. 241). But on cross-examination by Mr. Nikoloric, counsel for Alexander, the subject was reopened (R. 255), the witness testified the offer was made on November 26, 1951, (R. 257), and that it was offered to Marsh, in the presence of Brenner, Mrs. Marsh, and Blanford. (R. 263). That the offer was made was confirmed by Taylor, who testified that the offer was not made to him and that he first learned of it from Brenner, who told him about it "late in the year—last year sometime" (R. 673-674). And, asking a defense witness about it later in the trial, the court below referred to it as "a firm offer" (R. 651-652).

timber had a value of around $13.00 (R. 395), and Jesse W. Forrest, general manager of the Coos Bay Lumber Company, testified "We would be willing to pay at least $10 per thousand (R. 424).[18]

Charles M. Lord, a forester in the United States Forest Service testified that the timber was cruised by himself and five others over a period of four weeks and that the timber footage was 34,126,000.38 (R. 311-318).[19] The cruise (Ex. 57, original) was admitted in evidence. (R. 315).

W. E. Bates, a forester in the Forest Service, testified that on the basis of that cruise the timber had a value of $432,228.10 (R. 486). He also testified that in 1951 the Department of Agriculture under public bidding had made six sales of timber in the Siskiyou National Forest. This was five or six miles from Gold Beach where the property in this suit was located (R. 483). 6.4 million feet were sold at $29.55 per thousand, 6.6 million feet sold at $26.80, 19.2 million feet sold at $22.75, 7.1 million feet sold at $15.50, 1.2 million feet sold at $11.45 and ½ million feet sold at $20.90 (R. 534-536). The witness classified the timber in some instances as better and in others as poorer than the Grant and Thornton timber, but $11.75 was the lowest price on any of it.[20]

There is thus an abundance of support for the trial court's finding that the consideration of $135,000.00

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[18] It will be remembered that Gray, when he appraised the timber in mid May, 1951, had used a figure of $5.50 per thousand (R. 145).

[19] Gray, on the basis only of Wilkes' 25-year old cruise, had "estimated" 24,000,000 feet (R. 145).

[20] Originally, both this witness's valuation of $432,228.10 and his testimony on these sales were stricken on objection (R. 492, 542). The court later reversed this ruling (R. 565-566) and the court used the sales in examining defense witness Fry (R. 647-648, 651).

was grossly inadequate and no occasion arises for dealing with defense testimony.[21]

4. *The Findings of Fact and Conclusions of Law:*— These are fully set out in the Government's opening brief as appellant (pp. 5-10) and will merely be summarized here. The Taylors agreed to pay $25,000.00 to whatever Indian delivered the title to them, they paid the $135,000.00 to the Indian Agency and put $25,000.00 in escrow for Siniscal (Fdg. 4, R. 24-25). Siniscal was a mere agent for hire and a conduit for title in behalf of the Taylors. Siniscal was not an Indian within the meaning of the regulations contained in 25 C.F.R. 241 and in particular Section 241.11 (Fdg. V, R. 57).[22] Siniscal made false representations as to her status, financial responsibility and intentions to E. Morgan Pryse, Area Director (Fdg. VI, R. 57). The Taylors and their agent, Siniscal, and others concealed from Pryse the fact that the Taylors were in truth the real

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[21] The defendants produced five witnesses who testified to values of $5 to $7 per thousand. Three were interested witnesses—Alexander, Mrs. Alexander, and De Gross, who had the contract with Taylor to log this property (R. 612, 621). The reaction of the court below to this testimony is shown at R. 689, where, addressing counsel for the Taylors and referring to Taylor's refusal on August 7 to give an option to Brenner and Marsh at $260,000.00, taking a profit of $100,000.00, the court said: "Mr. Henderson, you have put on a lot of testimony to the effect it was worth only $5.00 per thousand. It doesn't go too well when on the day that Mr. Taylor purchased it and sold it on option, he refused to sell the option for $260.000.00."

[22] 25 C.F.R. 241.9 provides for sales to an Indian tribe of heirship lands on all reservations for a reasonable consideration administratively determined. This is inapplicable here, since this was not a sale to a tribe. Sec. 241.10, providing for sale to the United States in trust, is likewise inapplicable. Sec. 241.11 is the only section in the regulations allowing sale to an individual Indian "without the consent of the heirs, without calling for bids or after bids have been called for." Following this is a series of regulations applicable "in cases where sales cannot be made pursuant to Sections 241.9, 241.10, 241.11" (sec. 241.12). These regulations, particularly 241.25 through 241.29, make clear that a sale of the land in suit to a non-Indian must be made through competitive bidding.

buyers (Fdg. VII, R. 58). The consideration of $135,000.00 was "grossly inadequate and shocking to public conscience" and Pryse was unaware of the true value of the property (Fdg. VIII, R. 58). The evidence "clearly, certainly and convincingly establishes" that the Taylors and those in concert with them knew a publicly advertised sale was required unless a sale was made to a bona fide Indian purchaser and used Siniscal as a subterfuge to avoid that requirement, and "the true identity of defendants Taylor as purchasers was concealed." (Fdg. IX, R. 58). By reason of the foregoing false representations and concealment Pryse signed the Order Transferring Inherited Interests and the Order Removing Restrictions, and would not have done so had he known the facts (Fdg. XI, R. 59).

The court concluded that Siniscal, as a mere conduit of title, was not an Indian purchaser within regulations 25 C.F.R. Part 241 (Concl. II, R. 60). The orders removing restrictions and transferring inherited interests were beyond the authority of the Area Director and hence null and void (Concl. III, R. 60). Likewise the deed from Siniscal to the Taylors and the contract between Siniscal and the Taylors are null and void (Concl. IV, R. 60) and by reason of the fraud and gross inadequacy of consideration the entire transaction should be rescinded (Concl. VI, R. 61).[23] Judgment was entered accordingly (R. 66-69).

ARGUMENT

The brief of appellants does not state what relief they want from this Court. Siniscal's only right is against

[23] The court's further conclusions that the Taylors are entitled to be made whole and that the property must be sold by the Government for that purpose, and similar provisions in the judgment, are the subject of the Government's cross-appeal.

the Taylors to obtain the $25,000.00 placed in escrow for her by them and the only relief she could possibly receive would be against them.[24] Her interest in the property, assuming she ever had any, admittedly passed by deed to the Taylors, and as between the Taylors and the United States, the judgment herein has become final insofar as title to the property is concerned. While it would thus appear that the onus of answering appellants is on the Taylors, we proceed to present argument.

I

The Trial Court Did Not Err in Adjudicating That the Transaction by Which the Government's Title Was Sought to Be Divested Was Fraudulent and Void.

Nothing other than a reading of the evidence in this case, which we have documented in the statement (*supra,* pp. 2-20), is needed to establish the fact that Siniscal was a mere straw used by the Taylors as a channel by which they could buy the property and that the motive was to avoid a sale under competitive bidding and thus acquire the property for $135,000.00. They were not themselves eligible to buy at that price, and they sought to evade the law which made them ineligible by using Siniscal. Siniscal herself referred to the $25,000.00 she was to get as her "commission" (R. 782) and at R. 788 readily agreed it was a commission for her taking a deed. Appellants in their brief unwittingly conceded she was being paid for services as a straw at Br. 5 where they refer to the $25,000.00 as "a fee for her services."

Thus this case is exactly like *United States* v. *Trinidad Coal Co.,* 137 U.S. 160 (1898). There the company,

[24] Reed has no interest of record in anything, since his only claim was for $12,500.00 against Alexander, which fell by the wayside.

ineligible under the law to acquire more than 320 acres of public land, gave certain officers and employees the money with which to file individual entries, the company having taken deeds from them in advance. The entries were made, patents issued, and as a result the company had deeds to 954 acres. The Government sued to cancel the patents. Answering a contention that the bill alleging the above facts did not state a case, the court said (137 U.S. at pp. 166, 167):

> * * * This contention cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the Statute. If the scheme described in the bill be upheld as consistent with the statute, it is easy to see that the prohibition upon an association entering more than three hundred and twenty acres * * * would be of no value whatever. * * * There is * * * no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because if the facts admitted by the demurrer had been set out in the papers filed in the land office, the patent sought to be cancelled could not have been issued without violating the statute. * * *

Answering a contention that the individuals had a right, on their own responsibility, to make an entry under the statute and later dispose of it, the court stated (p. 168) "The case before us is not of that class."

So here, the policy of the regulations requiring competitive bidding in a sale to a non-Indian "should not be frustrated in this way," and if the scheme shown in this record were to be sustained, the law requiring sale to a non-Indian to be under competitive bidding would be meaningless. And while Siniscal, as an Indian, was entitled to purchase in her own right without competitive bidding, "The case before us is not of that class."

Similarly in *Causey* v. *United States,* 240 U.S. 399 (1915). Causey made an oath required by law that he had not and would not make any contract whereby title to land on which he made a homestead entry would inure to the benefit of another and at the time of final entry presented proof to the same effect and paid the statutory price. The Government later sued to recover title on the ground that the oath and proof were false and was granted relief. Causey was in the same position as is Siniscal in this case. He was, while posing as acquiring the land for himself, actually acting for another. And just as federal policy and law were violated in the above case, it has been violated here.

Those cases also show that inadequacy of consideration need not be established in order for the Government to prevail in such a case because the full statutory price had been paid in each instance. "* * * The financial element in the transaction is not the sole or principal thing involved. This suit was brought to vindicate the policy of the government * * *." *Pan-American Co.* v. *United States,* 273 U. S. 456, 509 (1927). However, as we have shown, and the court below has found, the consideration paid in this case was grossly inadequate.[25]

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[25] At Br. 19 appellants harp on Gray's appraisal, stating "There always is a presumption that an official duty has been honestly and

That the fraud practiced upon the Area Director Pryse and the Government was participated in by Government employees, even to the extent of devising special instruments to effect the transfer, is clearly indicated by the record. But the right of the Government to protection against the defendants cannot be affected by the fact that its employees are corrupted rather than misled. *Pan American Petroleum Co.* v. *United States,* 9 F. 2d 761 (C.A. 9, 1926), affirmed 273 U. S. 456.

II

The Order Transferring Inherited Interests and the Order Removing Restrictions Were Beyond the Authority of the Area Director, Violative of Federal Laws and Regulations, and Are Void.

The trial court held that the approval of the Order Transferring Inherited Interests and the Order Removing Restrictions on Siniscal were beyond the authority of the Area Director and are null and void (Concl. III, R. 60). This constitutes an independent ground of judgment if it is correct. In this respect the case differs from the cases hereinbefore cited, where the acts of government officials were within their *powers* but were procured through fraud to be done in behalf

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regularly performed." True, but the contrary can be shown. Moreover, even if the appraisal had been an honest one, by a competent appraiser who viewed the land as required by 25 C.F.R., 241.24, Taylor still could not legally buy it at that figure except at a competitive sale where he was the only bidder. An appraisal merely establishes a minimum value for which it may be sold under bidding, 25 C.F.R. sec. 241.24. Also at the bottom of the page it is stated that "Inadequacy of consideration is not significant in suits over Indian lands." Presumably they mean that where Indian lands are fraudulently obtained from the Government, the circumstance that the Government was badly overreached has no tendency to establish fraud. The cases they cite, only one of which involves Indians, do not establish that proposition.

of ineligible purchasers. We proceed to demonstrate that, although Pryse signed these orders without knowing their character, they were beyond his authority and hence violative of the law and void.

As the court below found (Fdg. II, R. 56), the authority of the Area Director derives from Order 551 of the Commissioner of Indian Affairs, 16 C.F.R. 2939. By section 3 of that order the authority of the Commissioner is delegated to Area Directors "in the following classes of matters." Manifestly the Commissioner could not delegate authority he did not have. The Commissioner's authority is found in the regulations of the Secretary. So far as issuing fee patents to land allotted under the General Allotment Act is concerned, his authority is prescribed in 25 C.F.R. Part 241. There is no regulation empowering the Commissioner to issue fee patents. And the authority of Pryse with regard to issuance of a fee patent to the land in suit was limited by section 4 of Order 551 delegating to the Area Director "The approval of *applications* for fee patents, pursuant to the provisions of 25 C.F.R. Part 241." (Italics supplied.) Thus, while Pryse could recommend to the Secretary that a fee patent issue, he himself could not issue it.[26]

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[26] Six times in appellant's brief it is stated that a fee patent was issued to Siniscal (~~applicants'~~ appellants' brief 8, 9, 14, 25, 26, 24). At Br. 26 it is stated that the Secretary of the Interior "issued a patent to Siniscal on September 26, 1951, and delivered it to the Land Office Department of the Indian Bureau, Portland, and there it was held up * * *." Such statements by counsel for appellants are inexcusable. Appellants' counsel, as elsewhere in their brief, cite no record evidence in support of these repeated statements. The court below found as a fact (Fdg. IV, R. 57) that "in fact no patent in fee to the lands here involved has ever been issued by the United States to anyone," and it is not the law that an appellant can overturn a finding of fact by merely stating the contrary. No claim was ever advanced at the trial that a patent had been issued to Siniscal, or

That is why the standard form was altered. If Exhibit 21 (R. 160-163) had been used without change, the fee title remained in the Government and could not be divested by any local official. The change in Exhibit 21 to convert the title status from trust patent land requiring action by the Secretary into a fee in Siniscal with a restriction on alienation, and the use of the order removing restrictions, was made because the Area Director *does* have power to remove restrictions on purchased lands where fee is in the Indian with restrictions on alienation. Removal of restrictions on purchased land is provided for in 25 C.F.R. sec. 241.51. Purchased lands are defined in section 241.49 as lands held by Individual Indians under deeds or other instruments which recite that they "may not be sold or alienated without the consent or approval of the superintendent, the Commissioner of Indian Affairs, or the Secretary of the Interior." Applications for the removal of restrictions are provided for in section 241.51, which further provides that, in approved cases, "an order removing all restrictions against alienation of the land * * * will be issued by the Commissioner of Indian Affairs or his authorized representative." Thus the Commissioner did have authority to create an unrestricted fee in an Indian owning purchased land as defined. And the Area Director became his "authorized representative" with like authority by virtue of section 5 of Order 551, delegating to him "The removal of restrictions against alienation of Indian lands, other than allotted

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even that she had applied for it. There is evidence in the record that Taylors' counsel applied for a patent (R. 590-591, Ex. 70, 71 R. 298-299). These exhibits show an inquiry by the Portland Office in May 1952 as to whether any patent had issued and a reply that none had issued or would issue pending investigation.

lands of the Five Civilized Tribes, pursuant to the provisions of 25 C.F.R., Part 241." [27]

It is thus clear that the alteration of Exhibit 21 incorporated in the Order Transferring Inherited Interests (Ex. 5, R. 163-166) as prepared by La France at Flinn's direction was an attempt to bring the property into a title status over which Pryse had the power to create an unrestricted fee in Siniscal. [28]

The device must, however, fail. We have demonstrated that the only way the fee title of the Government in this property could be divested was by a fee patent issued by the Secretary and that no power to divest the Government's title resided in the Area Director. Therefore any orders of his, no matter how ingenious, were *ultra vires,* violative of federal laws, regulations, and restrictions, and therefore void. *Heckman* v. *United States,* 224 U. S. 413 (1912). And since the Order Removing Restrictions depended for its validity upon an invalid order creating those restrictions, it too was void.

Appellants (Br. 23-25) do not meet the question at all. They parade before the court Exhibit 22 which we have previously shown was entirely inappropriate and was not used in devising the special order here in question. They make no reference to Exhibit 21, which we have shown needed no alteration. They state (Br. 24)

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[27] There is nothing anomalous in the fact that protection at a higher level is afforded in the case of trust patent allotted lands. Allotted lands are provided for the Indian by the Government and in many instances are all he owns. They are an instrumentality of the Government to sustain him. Purchased lands are lands which the Indian himself has acquired.

[28] The change in the customary form and the court's finding that the one here used "was employed in this case for the first time in relation to trust allotted" lands (Fdg. III, R. 56-57) demonstrate the error in appellants' assertions (Br. 12, 28) that this procedure had been followed for many years prior to this transaction.

that "this restriction [the restriction inserted by La France] retained in the Government all of the substance of the restriction of the original trust patents." Assuming that, why did they change Exhibit 21? No answer to that is given by appellants. Again at Br. 25 they state "as we said before, the key to the whole situation was with the Secretary of the Interior." That is right and no power can be shown in the Area Director to take the key away from him. The Secretary has always had it, and he used it when the Taylors applied for a patent, which he refused.

III

Appellant's Contentions Lack Merit

We have shown in points I and II of this brief that, for two independent reasons, the transaction whereby title of the property was sought to be transferred to the Taylors was properly set aside by the court below. For clarity we will now comment upon each of the various headings of appellants' brief.

Point I (Br. 15)—Whatever the contention sought to be made under this heading without citation of authority, it is perfectly clear that the United States has authority to bring an appropriate action to set aside fraudulent and otherwise illegal conveyances of land held in trust for Indians. *Heckman* v. *United States*, 224 U.S. 413 (1912).

Point II (Br. 16)—As shown by the Statement, the court's conclusion that Siniscal was a mere conduit and not an Indian within the meaning of the regulation governing sale to an Indian is fully supported by the evidence. This is obviously not a conclusion that Siniscal is a non-Indian for other purposes.

Point III (Br. 17)—We have shown in point II

supra, that the Order Transferring Inherited Interest and the Order Removing Restrictions were beyond the authority of Pryse. Appellants' pretense that the court was talking of Siniscal having exceeded her authority is preposterous.

Point IV (Br. 17-18)—Inasmuch as the contract between Siniscal and the Taylors was simply one element of the transaction by which title to the property was sought to be transferred from the United States to the Taylors, it was correctly adjudged void.

Points V and VI (Br. 18-23)—In footnote 25, *supra,* p. 19, we have dealt with the appraisal of Mr. Gray, and there demonstrated that the appraisal was not, as appellants say, "the outstanding issue" and that it in no way benefits appellants' case. The facts of record as to the application for removal of restrictions (Statement *supra,* pp. 12-15) constitute a complete answer to this portion of appellants brief.

Points VII and VIII (Br. 23-29)—Appellants' argument on the Order Transferring Inherited Interests is answered under Point II *supra.* There was no fee patent issued to Siniscal on September 26, 1951 (see footnote 26, *supra,* p. 28). The fate of the $25,000 placed in escrow by the Taylors is of no concern to the United States.

Point IX (Br. 29-30)—We agree that the court erred in ordering the land sold, but for reasons stated in our brief as cross-appellant.

Points X and XI (Br. 30-32)—We have demonstrated in Point I *supra,* both on the facts of record and authority, that this transaction was fraudulent. While, as appellants say (Br. 31), "The law never presumes

fraud," the court below did not presume it in this case but unerringly found it on the proof.

Point XII (Br. 33)—Appellants' argument that this suit should have been dismissed in the interest of the Government's wards is self-answering.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below, insofar as it adjudges void the documents purporting to divest the Government of its title, be affirmed.

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AUGUST, 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 266805 175